IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 124 of 1998

PREM DUTT

Versus

KENDRIYA VIDALAYA SANGATHAN

Appearance:

MR DM THAKKER for Petitioner

MR JAYANT P BHATT for Respondent-Caveator

CORAM : MR.JUSTICE S.K.KESHOTE

Date of Order: 13/02/98

C.A.V. ORDER

1. By way of this petition under Article 226 of the Constitution, the petitioner challenges the order dated 5-1-1998, annexure `C' under which the respondent No.1 has ordered that the appointment of the petitioner to the post of Principal is ab-initio void as he did not possess the required essential qualification as defined in the advertisement and as prescribed in the recruitment rules for the post as on 10-4-1995, the last date of receipt of application for the purpose. Further the order of appointment of the petitioner on the said post was ordered to be cancelled.

2. The facts of the case, in brief, are that on 19th October, 1982, the petitioner was appointed as Post Graduate Teacher (PGT) in the respondent No.2-establishment. Vide advertisement dated 24th February, 1995 of the respondent, the applications were invited for appointment to the post of Principal by selection. 17th March, 1995 is the date on which the petitioner submitted his application for the post of Principal. The petitioner was called for interview vide memo dated 15th June, 1995 and he appeared before the selection committee for interview on 22nd June, 1995. The petitioner was selected for the said post and under the order dated 21st July, 1995 of the respondent he was appointed on the post of Principal. The petitioner was given the appointment on probation for a period of two

years subject to the condition of the extension thereof, if necessary. Under the notice dated 21st March, 1997 of the respondent No.1 he was called upon to show cause as to why his appointment as Principal should not be cancelled as it is ab-initio void. The ground on which this appointment of the petitioner was sought to be cancelled was given in the notice. The petitioner was stated to be not possessing the minimum qualification prescribed for the post of Principal in Kendriya Vidyalaya. The petitioner submitted his reply to the show cause notice on 4th April, 1997 and after giving personal hearing to him, the impugned order has been made. Hence, this special civil application before this Court.

3. The learned counsel for the petitioner contended that the respondents are estopped from cancelling the appointment of the petitioner as the respondent had appointed the petitioner with full knowledge about the fact that the petitioner has experience of 12 years and 5 months instead of 15 years. It has next been contended that the petitioner has not concealed any fact and when the respondent knowing well that he lacks the requisite experience of 15 years and he was given the appointment by the respondent then the requisite experience is deemed to have been waived. It has next been contended that the cancellation of the appointment of the petitioner after about two and half years of his date of appointment is illegal and arbitrary. Lastly, the counsel for the petitioner contended that by now the petitioner has completed 15 years experience of teaching as he has taken the periods in secondary and higher secondary sections as Principal and as such his order of appointment should not have been cancelled. In support of his contention, the counsel for the petitioner has placed reliance on the decision of this Court in the case of Ramgiri Keshavgiri Goswami vs. K.M. Raval reported in 1985 GLH 351 and of the Apex Court in the case of Shrawankumar Jha vs. State of Bihar reported in AIR 1991 SC 309.

4. On the other hand, the counsel for the respondents Shri J.P. Bhatt, strongly opposed this special civil application.

5. I have given my thoughtful consideration to the submissions made by the learned counsel for the petitioner.

6. The learned counsel for the petitioner does not dispute that on the last date which has been fixed in the advertisement inviting applications for appointment to

the post of Principal, the petitioner was not possessing the requisite experience as prescribed under the rules and the advertisement itself. So there is no dispute from the side of the petitioner that the petitioner was not possessing the minimum prescribed essential qualification of experience for appointment on the post of Principal.

7. The respondent No.1 in its order impugned in this special civil application has given out that on 10th April, 1995, which was the last date of receipt of application for the post of Principal, the petitioner was not possessing 15 years experience of teaching. In the memorandum dated 5-1-1998, the essential qualifications which were prescribed for the post of Principal are given, which are as under:

i) Atleast second class Master's Degree (45% marks and above considered as equivalent) in Mathematics, Physics, Chemistry, Zoology, Botany, English, Hindi, Sanskrit, History, Geography, Commerce or Economics.

ii) A degree or Post Graduate Degree/Diploma in Teaching Education.

iii) Atleast 10 years experience including minimum 7 years teaching experience in Sr. Secondary or Higher levels in recognised institutions and minimum of 3 years experience in educational administration.

Experience in Educational Administration is defined as under:

a) As Principal/Headmaster of a High School /Hr. Secondary School/Inter College/Degree College, OR

b) As Vice-Principal of Higher Secondary/Inter College/Degree College or Head of the Deptt. in a Degree College/University Teachers Training College, OR

c) As House Master in Public/Sainik School or as Officer in Army Education Corps., OR

d) As Vice-Principal in a Kendriya Vidyalaya for 03 years or more, OR

e) As Vice-Principal and/or as PGT in Kendriya Vidyalaya for atleast 10 years in case of those who have passed the Departmental Examination, OR

f) As Vice-Principal and/or as PGT in Kendriya Vidyalaya for atleast 15 years.

8. The petitioner was required to possess atleast 15 years experience as PGT in Kendriya Vidyalaya. A PGT in Kendriya Vidyalaya who has passed the departmental examination was required to possess 10 years teaching experience. In the application form submitted by the petitioner he stated regarding his experience that he possesses 12 years and 5 months teaching experience as PGT and further that he appeared in the departmental examination. On being asked by the Court, the learned counsel for the petitioner admits that on the last date of the receipt of the applications as well as even on the day on which the petitioner was given the appointment, the result of the departmental examination in which the petitioner appeared, had not been declared. The learned counsel for the petitioner further admits that though subsequently the result has been declared but the petitioner is declared as failed.

9. It is no more res integra that the requisite qualifications prescribed for the appointment to a post has to be fulfilled by a candidate on the last date of the receipt of the applications for the post if otherwise not provided. The finding which has been recorded by the respondent No.1 on this point has also not been challenged by the petitioner nor it is a case of the petitioner that the eligibility has to be considered on the day on which the impugned order has been passed. In fact it is also the case of the petitioner that requisite eligibility for the post of the Principal has to be possessed on the last date fixed for receipt of the application by the candidates.

10. It is true that the petitioner has disclosed the fact that he is possessing 12 years and 5 months experience as a PGT but it is equally true that he mentioned in the application that he appeared in the departmental examination. Be that as it may. In the matter of appointments where the candidate who has been selected lacking minimum requisite eligibility prescribed, the doctrine of estoppel will not be applicable. Otherwise this Court sitting under Article 226 of the Constitution will certify an appointment to be legal though that appointment was ab-initio illegal. The

learned counsel for the petitioner has also failed to show any decision either of this Court or other Courts or of the Apex Court where a view has been taken that only because the appointment has been given on the full disclosure of facts by the petitioner though he was not possessing minimum qualifications prescribed for the appointment on the post of Principal, that appointment has to be protected by this Court or that the respondent/appointing authority is estopped from taking any action. In fact it is a case of mistake committed by the respondent-appointing authority as well as by the selection committee. The petitioner in fact should not have been called for interview and by mistake he has been called and he has also been selected and further mistake has been committed that without properly verifying the requisite qualifications possessed by the petitioner with reference to the minimum qualification required to be possessed by him by the appointing authority he has been given the appointment. Such a mistake can be corrected by the respondent but while doing so what is expected of the respondents is to give an opportunity of hearing, which procedure has been followed in this case.

11. The matter has to be considered from another aspect. The petitioner was given the appointment only on probation and the respondent came to know about this mistake before the expiry of the period of two years of probation of the petitioner. The action for correction of this mistake has been initiated by the respondent on 21st March, 1997 by giving show cause notice to the petitioner and the two years probation would have ended only on 21st July, 1997. The appointment of the petitioner was subject to the condition, which reads as under:

> During probation and thereafter until he/she is confirmed, the services of the appointee are terminable by one month's notice on either side without any reason being assigned therefor. The appointing authority however, reserves the right to terminate the services of appointee before expiry of the stipulated period of notice by making payment of a sum equivalent to the pay and allowances for the period of notice or the unexpired portion thereof.

12. So the appointment of the petitioner on probation was terminable during the probation and thereafter until he is confirmed by one month's notice on either side without any reason being assigned therefor. The

appointing authority further reserved the right to terminate the services of the petitioner before expiry of stipulated period of notice by making payment of a sum equivalent to the pay and allowances for the period of notice or the unexpired portion thereof. The petitioner accepted the appointment subject to the aforesaid condition and as such when the petitioner was found to be not possessing the requisite eligibility for the post of Principal that appointment was liable to be terminated during the period of probation. It is different matter that the respondent has taken reasonable time to decide this matter and the ultimate order has been passed after more than two years of the appointment but nevertheless the appointment of the petitioner continued to be only on probation as he was not confirmed on the post. When the petitioner's appointment was subject to termination without assigning reasons on one month's notice then how far the counsel for the petitioner is correct to contend that the appointment of the petitioner after two years could not have been terminated and more so when the action for cancellation of the appointment was initiated before expiry of the period of two years. The termination of the services of the petitioner without any reason and by giving one month's notice was permissible during the period of probation and thereafter until he is confirmed. So the contention of the counsel for the petitioner that the respondent is estopped from terminating the services of the petitioner or that action could not have been taken after more than two and half years' of his services is wholly untenable. Reference here may have to the decision of this Court in the case of Mukesh B. Desai vs. State of Gujarat reported in 1997 (3) GCD 645, wherein this Court held:

> 9. Ordinarily, the principle of "Last Come, First Go" would apply in cases of retrenchment. That is the basic principle of labour law. Where, however, in cases like the present, when Lecturers had been appointed pending regular selection and it is stated in the letter of appointment that if regularly selected candidates are not available, then the appointment will be only for a fixed period of 11 months, it will not be appropriate or legal for a Court to disregard the specific terms of the letter of appointment and allow a Lecturer to continue to remain in office. If the initial order of appointment, restricting the appointment for a period of 11 months is valid, and we have no doubt in our mind that it is so, then the Court cannot, at a later point of time, disregard the terms of appointment

> and allow a candidate to continue. This is precisely what the appellants want the Court to do but which is not permissible. At the risk of repetition, it is observed that it is open to an employer to make an ad hoc arrangement, by stating that the appointment will be till a regularly selected candidate is available or for a period of 11 months, whichever is earlier. Such a term in the order of appointment of an ad hoc employee, who is not selected by the G.P.S.C., which is required by the Rules, would be a valid clause and if this is so, it is not open to the selected candidate to contend that the Court should disregard the period of appointment for which he was appointed and to give a direction which would, in effect, allow him to continue to remain in office. This is more so in a case, like the present one where the appellants belong to a general category and are occupying posts or claim to occupy posts, which are meant for a reserved category.

13. In view of the said decision of this Court, the petitioner is bound by the terms of the appointment subject to which he accepted the same on the post of Principal. The appointment of the petitioner has been cancelled for the reason that he was not possessing the requisite qualification and this order has been passed after giving notice and an opportunity of hearing to him. The appointment of the petitioner on the post of Principal was bad in law and as held by their Lordships of the Hon'ble Supreme Court in the case of Pramod Lahudas Meshram vs. State of Maharashtra reported in 1996 (10) SCC 749, his services could have been terminated during the period of probation without giving any notice or opportunity of hearing to him whereas in the present case, the principles of natural justice have been followed. However, in fact it is not the case where the petitioner will go out of employment. He will be reverted back to the post of PGT in the Sansthan on which post he has the lien and giving of one month's notice or the salary of one month in lieu thereof is of little consequence in the present case also. Truly speaking it is not the case of termination of services of the petitioner but it is a case of cancellation of appointment of the petitioner on the post of Principal and consequence thereof would have been of his reverting back to the post of PGT.

14. The appointment of the petitioner who was not possessing the requisite minimum qualification prescribed

for the post of Principal has affected the right of those other persons who otherwise would have been selected in his place and would have been given the appointment on the post of Principal. In such matters, the doctrine of estoppel cannot be given effect to more so when the petitioner was given the appointment only on probation.

15. The matter may be examined yet from another angle. It is a settled law that sitting under Article 226 of the Constitution, this Court will not perpetuate any illegality. The appointment of the petitioner on the post of Principal was ab-initio illegal and in case while applying the doctrine of estoppel or the delay in the action taken on the part of the respondent to correct this mistake then what this Court will do to restore the illegal appointment of the petitioner on the post of Principal. This Court may decline to issue a writ of mandamus or a writ of certiorari where the effect of quashing the impugned order would be to restore an illegal order. In case the impugned order is set aside by this Court sitting under Article 226 of the Constitution then certainly it will result in the restoration of the appointment of the petitioner on the post of Principal which was ab-initio illegal.

16. The last contention of the counsel for the petitioner that by now the petitioner has acquired the experience of 15 years teaching in secondary and higher secondary sections and as such his appointment on the post of Principal should not be cancelled, is devoid of any substance. Whatever teaching experience has been gained on the basis of ab-initio illegal appointment cannot be taken or counted for the purpose of requisite experience prescribed for the post of Principal. As stated earlier, the eligibility for appointment on the post of Principal has to be looked into on the last date fixed for the receipt of the applications and the eligibility cannot be considered on the day on which the appointment has been given or when the authority corrected the mistake made in making of the appointment. In this respect it is advantageous to have reference to the decision of the Apex Court in the case of Rekha Chaturvedi vs. University of Rajasthan reported in 1993 (Supp) (3) SCC 168.

17. Now briefly I may consider the two decisions which have been cited by the learned counsel for the petitioner. In the case of Shrawankumar Jha vs. State of Bihar (supra) their Lordships of the Hon'ble Supreme Court held that while cancelling the appointment of the teacher appointed by the District Superintendent of

Schools by the Government on the ground that the District Superintendent has no authority, the prior opportunity of hearing should have been given to the teacher concerned. So before cancelling the appointment which has been made, the principles of natural justice are to be followed. This is the ratio of the decision of the Hon'ble Supreme Court on which reliance has been placed by the learned counsel for the petitioner. That decision is of little help to the petitioner as in the present case the impugned order has been passed not only after giving notice to the petitioner but even after giving an opportunity of personal hearing.

18. In the case of Ramgiri Keshavgiri Goswami vs. K.M. Raval (supra) the learned single Judge of this Court has held that the respondent can not woke up to their inadvertent mistake after more than two years. In that case also, the appointment of the petitioner therein was sought to be cancelled on the ground that he is overaged at the time of his appointment. But that observation has been made on the doctrine that the appointing authority has power to relax the age limit in appropriate cases. That decision has been given on the facts of that case and secondly in view of the decision of the Apex Court in the case of Rekha Chaturvedi vs. University of Rajasthan (supra) even in such matters, the relaxation could not be ordered where in the advertisement it has not been specifically mentioned that the age eligibility or the eligibility of the qualifications may be relaxed. Otherwise also, the learned counsel for the petitioner has failed to point out any Act or Rule or Circular or Resolution of the respondent under which there is a provision to relax the eligibility of requisite experience for the post of Principal. So this case is also of little help to the petitioner.

19. This matter was kept for pronouncement of the judgment on 06-02-1998 but before the judgment could have been pronounced, Smt. Sangita Pahwa put appearance on behalf of the petitioner and she prayed for making further submissions in the matter. Prayer was granted.

20. She contended that the petitioner though was lacking the requisite experience but the appointment given to him was not void-ab-initio and at the most it was an irregular appointment and that irregularity has been cured by his working on the post of Principal. The day on which his services were terminated he was having the requisite experience. In support of his contention, the learned counsel for the petitioner placed reliance on

one decision of the Hon'ble Supreme Court in the case of Ram Sarup vs. State of Haryana reported in AIR 1978 SC 1536. She further relied on the decision of this Court in the case of Patel Kantilal Ambalal vs. Government of Gujarat reported in 1993 (1) GCD 690 and in the case of Mohanbhai Jivraj Asari vs. Director, Peraplegia Hospital & Ors. in special civil application No.12934/94 decided on 10/7/1996. The decision of this Court in the case of Mohanbhai Jivraj Asari vs. Director, Peraplegia Hospital & Ors. (supra) is solely based on the decision of their Lordships of the Hon'ble Supreme Court in the case of Ram Sarup vs. State of Haryana (supra).

21. In the case of Ram Sarup vs. State of Haryana (supra) it is true that the appellant therein was not possessing requisite experience for the appointment on the post of Labour-cum-Conciliation Officer as provided under Rule 4 (1) of the Punjab Labour Services (Class I & II) Rules, 1955 and his appointment on the said post was held to be irregular by their Lordships of the Hon'ble Supreme Court. But that case is of little help to the petitioner. In that case, the appellant therein was appointed as Statistical Officer on 20th February, 1961 and he was confirmed in that position on 15th October, 1966. On 22nd February, 1967, he was appointed to the post of Chief Inspector of Shops and he worked in that capacity until 1st January, 1968 when he was appointed as Labour-cum-Conciliation Officer by the Government of Haryana. So he was transferred from the post of Chief Inspector of Shops to the post of Labour-cum-Conciliation Officer. It is a fact which has come on the record, that the Government has taken a decision that the posts of Statistical Officer and Labour-cum-Conciliation Officer should be treated as inter-changeable. However, the Punjab Labour Service (Class I & II) Rules, 1955 which were the statutory rules made in exercise of powers conferred under the proviso to Article 309 of the Constitution were not amended in conformity with the aforesaid decision of the Government. The appellant continued to work on the post of Labour-cum-Conciliation Officer upto 28th April, 1977. So he worked for about nine years on the post and thereafter on the ground that he was lacking the requisite qualification for appointment on the post of Labour-cum-Conciliation Officer he was sent back to the post of Statistical Officer, which gave rise to the litigation, which has been ultimately decided by the Apex Court.

22. So that was the case where the Government itself has considered the post of Statistical Officer to be inter-changeable with the post of Labour-cum-Conciliation

Officer and further the appellant therein has been transferred by the Government on the post of Labour-cum-Conciliation Officer from the post of Chief Inspector of Shops and on that post he worked for about nine years. In those facts, taking it to be an irregular appointment, the Hon'ble Supreme Court has not considered it to be a fit case where the appellant therein should be ousted from the post.

23. That case is clearly distinguishable with the present case. Even if it is taken that the lack of requisite experience by the petitioner has only resulted in irregularity in his appointment, but he was appointed on probation and he was not confirmed on the post. During the period of probation, if this mistake committed by the respondents has come to their notice, then they were perfectly legal and justified in discontinuing his services as Principal. It is not a case where the petitioner would have been rendered jobless but he would have been reverted back to his original post.

24. In the case of Patel Kantilal Ambalal vs. Government of Gujarat (supra), the petitioner therein worked for about ten years and his services were sought to be terminated on the ground that he got his appointment by producing bogus certificates. That irregularity was noticed by the Government in the year 1983 and inquiry was made and the report of the C.I.D. (Crime) was received in the year 1984 but thereafter no action has been taken. In those peculiar facts of the case, this Court has thought of not to permit the respondents to terminate the services of the petitioner. Here the action is not delayed but before completion of the period of probation, the action has been taken and secondly, at the risk of repetition it is submitted that the petitioner's services will not be terminated but he will be reverted back to his original post. So even if it is taken to be a case of irregularity then too it is not a fit case where any interference has to be made by this Court in the order impugned in this special civil application.

25. Taking into consideration the totality of the facts of this case, I do not find any illegality in the impugned order which calls for interference of this Court sitting under Article 226 of the Constitution. This writ petition fails and the same is dismissed summarily.

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